91-1134 (1)

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LAURA O. SLEDGE,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February 11, 1991

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QUESTIONS PRESENTED

1. Whether the Merit Systems Protection Board abused its discretion, ruled in a manner which conflicted with the principles set forth by this and other courts, and violated Petitioner's Fifth Amendment Due Process rights, when the Board refused to consider Petitioner's August 28, 1988, request for re-instatement of her appeal because her request was labeled as a motion for "reconsideration."

2. Whether the Merit Systems Protection Board abused its discretion, ruled in a manner inconsistent with the rulings of this and other courts, and violated Petitioner's Fifth Amendment Due Process rights, when the Board affirmed an Administrative Law Judge's refusal to take "judicial notice" of Petitioner's previous appeal records (which contained the reasons for Petitioner's late filing of her appeal) and then affirmed the

Judge's untimeliness ruling because of "good cause" had not been shown for the late filing of the appeal.

3. Whether the Merit Systems Protection Board abused its discretion, ruled in a manner conflicting with its own decisions as well as those of the Court of Appeals for the Federal Circuit, and violated Petitioner's Fifth Amendment Due Process rights, when the Board affirmed the Administrative Law Judge's decision that Petitioner did not have "good cause" for the late filing of her appeal due to her waiting until the Court of Appeals for the Federal Circuit had decided on this same case, to file her appeal.

4. Whether the Merit Systems Protection Board abused its discretion; made a ruling conflicting its own rulings, those of the Court of Appeals for the Federal Circuit, and the federal regulations under which it operates; and violated Petitioner's Fifth

Amendment Due Process rights, when the Board affirmed the Administrative Law Judge's decision that Petitioner was legally obligated to obey the Judge's initial decision before it became a final order.

LIST OF PARTIES

The parties of the proceedings below were the Petitioner, Laura O. Sledge and the Respondent, Department of Justice, Immigration and Naturalization Service.

The Parties remain the same before this Court.

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III. The Merit Systems Protection Board abused its discretion, ruled in a manner conflicting with its own decisions as well as those of the Court of Appeals for the Federal Circuit, and violated Petitioner's Fifth Amendment Due Process rights, when the Board affirmed the Administrative Law Judge's decision that Petitioner did not have "good cause" for the late filing of her appeal due to her waiting until the Court of Appeals for the Federal Circuit had decided on this case, to file her appeal. 19

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1990

LAURA O. SLEDGE,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Untied States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on November 14, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit has not been reported. It is reprinted in the appendix hereto, page

51 , infra.

The opinion of the Merit Systems Protection Board is reported. It is reprinted in the appendix hereto, page 43 , infra.

JURISDICTION

Invoking Merit Systems Protection Board jurisdiction under 5 USC §§1205 and 7701, Petitioner brought this appeal before the Merit Systems Protection Board. On April 2, 1990, the Merit Systems Protection Board affirmed the ruling of an Administrative Law Judge dismissing the appeal as being untimely filed.

On Petitioner's Petition for Review, the Court of Appeals for the Federal Circuit, on November 14, 1990, affirmed the decision of the Merit Systems Protection Board, without opinion. No petition for rehearing was sought. The jurisdiction of the court had been invoked by 5 USC §7703.

The jurisdiction of this Court to

review the decision of the appeals court is invoked under 28 USC §1254(1).

STATUTES INVOLVED
REGULATIONS INVOLVED

5 usc §7703(c): In any case filed in the United States Court of Appeals for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence.

5 CFR §1201.113 Finality of decision

The initial decision of the presiding official shall become final 35 days after issuance. Such decisions are not precedential.

> (a) Exceptions. The initial decision shall not become final if, within 35 days after issuance of the decision, any party filed a petition for review or if the Board reopens the case on its own motion.
>
> (b) Petition for review denied. If the Board denies all petitions for review, the initial decision shall become final upon the issuance of the

last denial.

(c) Petition for review granted or case reopened. If the Board grants a petition for review or a cross petition for review, reopens or dismisses a case, the decision of the Board shall be the final decision unless otherwise specified therein.

....

STATEMENT OF CASE

Petitioner was removed from her employment with Respondent-Agency effective February 12, 1988, for an alleged falsification of Standard Form 86 "Security Investigation Data for Sensitive Person", regarding Petitioner's marital status. Petitioner appealed the removal to the Merit Systems Protection Board (hereafter "Board") on March 1, 1988. On May 12, 1988, Petitioner filed a Motion for Continuance, as she was in the final trimester of a complicated pregnancy. The Board's Administrative Law Judge (hereafter "Judge") dismissed without prejudice Petitioner's appeal on May 25, 1988, subject to

Petitioner's re-filing of the appeal within thirty days of the delivery of Petitioner's baby.

Petitioner petitioned the full Board for review of the dismissal without prejudice. On August 22, 1988, the Board denied the petition for review. At that time, the initial decision by the Judge became final, according to 5 CFR §1201.113(b) (discussed in greater detail, infra, in "Reasons for Granting the Writ").

Once the Judge's initial decision became final, and in accordance with the terms of the Judge's ruling, Petitioner sought to re-open her case on September 15, 1988, by filing a "Motion for Reconsideration of Board's Final Order Dated August 22, 1988". In the motion, Petitioner asked her cause be re-instated (since her baby had been delivered). She also stated that if the case was not re-instated, Petitioner would be denied a hearing on the

merits of the case until after the Court of Appeals for the Federal Circuit (hereafter "Federal Circuit") decided her Petition for Review to be filed on September 19, 1988. Petitioner also attached a statement from her obstetrician saying that Petitioner had required more than thirty days of bedrest following her caesarean section delivery. On October 4, 1988, in a cursory decision by the Clerk of the Board, the Clerk stated the motion was entitled "Reconsideration", and since only the Office of Personnel Management could request a reconsideration of a final Board order, Petitioner's only recourse available was to appeal to the Federal Circuit, as there was no other further right to administrative review of the Board's decision.

On September 19, 1988, while the above motion was before the Board, but in keeping with 5 USC §7703(b)(1), Petitioner filed a "Petition for Review" and a "Motion for Stay

of Board's Order" with the Federal Circuit. On October 12, 1988, the Federal Circuit denied Petitioner's stay motion. On April 7, 1989, the Federal Circuit affirmed the Board's August 22, 1988, decision.

On May 6, 1989, Petitioner again moved for the Board to re-instate her original appeal and take judicial notice of the record of the case to this point. The Judge ordered on May 12, 1989, Petitioner to submit evidence and arguments showing the appeal was timely filed or "good cause" for the late filing of the appeal. Petitioner responded by asking the Judge to take judicial notice of the record of the prior appeal before the Board and the Federal Circuit (which contained the reasons for the time of the filing), to re-instate the appeal, and to set a hearing on the merit as appropriate. Respondent moved to dismiss the appeal as untimely filed. The Judge ruled she had no authority to grant a "re-

instatement", and she dismissed the appeal as untimely filed, noting that Petitioner attempted to re-file her appeal. The Judge did not address the judicial notice request of Petitioner. The Judge also noted that the outcome may have been different had Petitioner re-filed the appeal.

On July 31, 1989, Petitioner filed a "Petition for Review" with the Board regarding the dismissal by the Judge. On April 2, 1990, the Board deferred to the Judge on the ruling of "good cause", nothing the Petitioner had not responded to the Judge's "Show Cause" order. In footnote 2, the Board stated it would not rule on the matter of whether the delay in filing caused by waiting on a ruling from the Federal Circuit, was "good cause", since Petitioner had not responded to the "Show Cause" order and Petitioner had not obeyed the Judge's initial decision. The Board did not address - and therefore affirmed - the Judge's

ruling (or lack thereof) concerning judicial notice or the refusal to "re-instate".

Petitioner then filed a timely "Petition for Review" with the Federal Circuit. The Board's decision was affirmed without opinion on November 14, 1990.

Petitioner now files this "Petition for Writ of Certiorari".

REASONS FOR GRANTING THE WRIT

I.

The Merit System Protection Board abused its discretion, ruled in a manner which conflicted with principles set forth by this and other courts, and violated Petitioner's Fifth Amendment rights, when the Board refused to consider Petitioner's August 28, 1988, request for re-instatement of her appeal because her request was labeled as a motion for "reconsideration".

On May 25, 1988, the Judge dismissed without prejudice Petitioner's appeal due to Petitioner's medical complications with her pregnancy. Petitioner was given the right to refile the appeal thirty days after the birth of her child. This initial decision would conditionally become final on June 29, 1988, subject to Petitioner's filing a "Petition for Review" with the Board. Petitioner filed a "Petition for Review" with the Board to review the initial decision. On August 22, 1988, the Board affirmed the initial decision. (Infra, p. 36). Petitioner filed a "Motion for

Reconsideration of Board's Final Order Dated August 22, 1988" on August 28, 1988. The Clerk of the Board stated in a letter written on October 4, 1988, that only the Office of Personnel Management could request a reconsideration of a final Board decision.

No doubt exists that the Board's jurisdiction and operations come from the statutes (5 USC §7701, et seq.) and the federal regulations (5 CFR Part 1200, et seq.). Petitioner is aware that the Board cannot operate beyond those jurisdictional restrictions. However, the Board is not separated from the practice and customs of the federal judiciary, not exempt from the Constitution and federal laws of civil procedure and federal rules of evidence, and certainly, is subject to following the decisions of this and other federal courts.

While the only mention of "reconsideration" in the Board's regulations has to do with the Office of Personnel

Management (5 CFR §1201.118), the Board's responsibility regarding motions filed before it go beyond the mere reading of the title of the motion; the Board is to determine the substance and content of the motion. Since there is no federal civil procedure rule that states which motions may be used and what they must be named, attorneys are at liberty to label motions. The content of the motion is the determining factor.

When a case in a federal court has been dismissed, the attorney normally filed a "Motion for Reconsideration" to have the case re-instated. Petitioner's attorney did just that. The content of the motion requests a re-instatement of the case. Yet the Clerk treated it like a "reconsideration" because of the title. The Board later affirmed a ruling that the Board does not have the authority to "re-instate" a case, when Petitioner moved that the

original case be re-instated due to the amount of work which already had been done on the case (infra, p. 43). As the Court will see throughout this petition, the Board several times speaks of "reconsideration" and "re-instatement" regarding cases; e.g., Moore v. USPS, 41 MSPR 28 (1989) (the Board refuses, in its own words, to "re-instate" a petition for enforcement).

This ruling is in conflict with the principles set for the by this Court and several federal appeals courts. It seems to fly in the face of Arnett v. Kennedy, 416 US 134 (1973)(Petitioner's procedural right of review is defined by statute -- Id. at 163). According to the controlling statute, 5 USC §7701(a)(1), a federal employee has a right to a hearing before the Board when he makes a non-frivolous claim allegation of an adverse action by the agency. Burgess v. MSPB, 758 F.2d 641 (Fed. Cir. 1985). The employee must be given a fair and full

opportunity to make an effective case regarding an adverse administrative action. Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977). The Board held to the letter of the law and placed the spirit of the law on a "back burner" when it employed a procedural "surprise" to dismiss an appeal because of peripheral words used by counsel. Petitioner echoes the feelings of the Federal Circuit in Howell v. MSPB, 785 F.2d 282 (Fed. Cir. 1986):

> The Court is deeply concerned about having the judicial appeal rights of an employee cut off with respect to the merits by reason of confusing rules. Id. at 283.

The Board is not only working against the principles enunciated by the courts in the area of Board hearings, but it also directly violated Petitioner's Fifth Amendment Due Process rights as set forth by this Court. The Court's meaning given to the amendment tells that each individual is

given the right to notice of a hearing and the opportunity to be defended against the action. This protection of individuals is the essence of due process. Slackhower v. Board of Higher Education of New York City, 350 US 551 (1955). "Questions of due process are not to be treated narrowly or pedantically, in slavery to forms or phrases." Pearson v. McGraw, 308 US 313, 318 (1939). The Board, through its concentration on one word, dismissed Petitioner's appeal and thereby robbed her of the right to a hearing on the merits of her case.

II.

The Merit Systems Protection Board abused its discretion, ruled in a manner inconsistent with rulings of this and other courts, and violated Petitioner's Fifth Amendment Due Process rights, when the Board affirmed an Administrative Law Judge's refusal to take "judicial notice" of Petitioner's previous appeal records (which contained the reasons for Petitioner's late filing of her appeal) and then affirmed the Judge's untimeliness ruling because "good

cause" had not been shown for the late filing of the appeal.

On May 6, 1989, Petitioner moved for the Board to re-instate her original appeal and take judicial notice of the records of the previous appeals. On May 12, 1989, the Judge issued a "Show Cause" order to Petitioner to determine why the re-instatement/appeal was being filed seven months after the original decision became a final order. The reason for the time of the filing was contained wholly in the previous record, so Petitioner requested the Judge take judicial notice of the record. Instead of taking judicial notice, the Judge dismissed the appeal as being untimely filed without "good cause" shown for the late filing. The Board affirmed that decision, deferring to Judge's discretion on "good cause".

As stated, supra, the Board cannot ignore the rules of the federal judiciary

system, unless the statutes so declare. The federal evidentiary rule, Rule 201 "Judicial Notice", has not been removed from the rules applicable to the Board. This Court, as well as every other federal appeals court, has ruled that a court may take judicial notice of its own records [U.S. v. California Coop Canneries, 279 US 553 (1929)]; of its own records in another, interrelated case [Freshman v. Atkins, 269 US 121 (1925)]; of its own files in prior proceedings [Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260 (5th Cir. 1978)]; and, of its own records in other cases [U.S. v. Wilson, 631 F.2d 118 (9th Cir. 1980)]. Since the Board refused to follow the federal rules of evidence, it clearly abused its discretion.

The Board abandoned common sense in its affirmation. Petitioner had no reason to introduce any other documents in response to the "Show Cause" order than those contained

in the previous records. Neither the Judge nor the Board offered any argument for refusing to take judicial notice. Petitioner's request was just ignored. Nevertheless, ignoring Petitioner's request, the Board penalized Petitioner by stating that no reasons were introduced to show "good cause". Further, the Board said it would not look at the records in the "Petition for Review" stage because the records were being admitted for the first time at that stage. However, at the Regional level before the Presiding official, Petitioner had twice in earlier motions requested the Board to take judicial notice of the records.

The affirmation also violated Petitioner's Fifth Amendment Due Process rights. Had the Judge or the Board taken judicial notice by following the federal rules of evidence, Petitioner would have been allowed to go through with her hearing

on the merits. The Board, in deferring to the Judge on the determination of "good cause" in this case, showed that the Board was in conflict with the Federal Circuit. While the Board may defer to the Judge on questions of credibility and facts, the Federal Circuit has rules that the Board may not defer to the Judge on matters of law [Hale v. Department of Transportation, FAA, 772 F.2d 882 (Fed. Cir. 1985)], which would include the rules of federal evidence.

III.

The Merit Systems Protection Board abused its discretion, ruled in a manner conflicting with its own decisions as well as those of the Court of Appeals for the Federal Circuit, and violated Petitioner's Fifth Amendment Due Process rights, when the Board affirmed the Administrative Law Judge's decision that Petitioner did not have "good cause" for the late filing of her appeal due to her waiting until the Court of Appeals for the Federal Circuit had decided on this case, to file her appeal.

The Board's regulations provide that an appeal must be filed within twenty days of

the effective date of the action being appealed. 5 CFR §1201.22(b). Because the time limits is not required by statute, the Judge may waive or modify the regulatory time limit for filing an appeal. 5 CFR §1201.12. For "good cause" shown, the Petitioner may file an appeal after the twenty days. 5 CFR §1201.22(C)(1).

On June 27, 1989, the Judge wrote:

> The only remaining argument that the [Petitioner] might make concerning the timeliness of this appeal is that it was filed within 30 days of the issuance of the [Federal Circuit's] decision which affirmed the Board's final decision. Such circumstances, however, do not establish good cause for the waiver of the time limit. infra, p. 40 .

The Judge cited Dearsman v. Department of the Treasury, 16 MSPR 631, 636 (1983). The Board chose not to address the issue directly, thus affirming the decision

through its silence: (infra, p. 47)

> Since the [Petitioner' did not re-file her appeal within the time afforded her by that initial decision and failed to respond to the administrative judge's order to show good cause for her untimely filing, however, we find it unnecessary to reach the issue of whether the [Petitioner's] pursuit of this matter before the Federal Circuit established good cause for her additional delay.

Petitioner is confused by the Board's decision, especially in light of earlier Board decisions. The Board has ruled that "good cause" does not exist when a primary appeal is filed with a federal district court (Dearsman, cited supra by the Judge) or with the Federal Circuit [Gribcheck v. USPS, 41 MSPR 195 (1989)] instead of first filing with the Board. On the other hand, the Board has ruled that a Board case cannot be proceeding at the same time in front of

an appeals court. In Re Frazier, 1 MSPR 280 (1979). Also, when an employee had filed a petition for review with the Federal Circuit, the Board ruled it lacked jurisdiction to re-open or (in its own words) "reconsider" a case. Flescher v. USPS, 34 MSPR 643, 644 (1987). What the Board has done is force Petitioner to attempt to bring the same case before two forums, causing either a dismissal by one or both of the forums or, even worse, conflicting decisions by the forums. If Petitioner had re-filed her appeal with the Board and then filed a petition for review with the Federal Circuit, or vice versa, the outcomes would have been disastrous for Petitioner.

This is not the first "Catch-22" situation created by the Board. In a similar case regarding the filing with either the Board or the Federal Circuit, the petitioner missed the time limit for filing

a petition for review with the Board, but filed a late petition anyway during the thirty days given in the statutes for requesting a judicial review of the Board decision. 5 USC §7703. The petition was dismissed for untimely filing, and the petitioner requested judicial review of the Board decision. 5 USC §7703. The petition was dismissed for untimely filing, and the petitioner requested judicial review. The Board through a (in its own words) "Motion for Reconsideration", stated the petitioner lost his judicial review rights by filing with the Board first. The court stated in Howell v. MSPB, 785 F.2d 282 (Fed. Cir. 1986), that the petitioner could not be kept from filing with the Board and at the same time be forced to file a judicial appeal. Id. at 285. "Fairness compels the result, otherwise a person in petitioner's position could find himself barred from obtaining any review of an initial decision through no

fault of his own." Id. at 283, citing Strickland v. MSPB, 748 F.2d 681, 684 (Fed. Cir. 1984).

The decision affirmed by the Board also stated that Petitioner never sought guidance on the filing time for the appeal. Yet Petitioner put in her "Motion for Reconsideration":

> 7. That the result of the Board's final order will be to deny [Petitioner] a hearing on the merits until at least such time as the Court of Appeals for the Federal Circuit rules on [Petitioner's] Petition for Review which will be filed the week of September 19, 1988, with a Motion to Stay requesting the same interim relief as requested herein.

This should have been notice to the Board of Petitioner's position of record regarding filing times.

Finally, the Board's refusal to overturn the Judge's decision concerning

"good cause" with regards to the Federal Circuit ruling violated Petitioner's Fifth Amendment Due Process rights, for she was denied the right to a hearing because the Board applied a ruling which conflicted its won rulings and those of the Federal Circuit.

IV.

The Merit Systems Protection Board abused its discretion; made a ruling conflicting with its own decisions, those of the Court of Appeals for the Federal Circuit, and the federal regulations under which the Board operates; and violated Petitioner's Due Process rights, when the Board affirmed the Administrative Law Judge's decision that Petitioner should have obeyed the Judge's initial decision before it became a final order.

In her initial decision, the Judge wrote "the time limits for the [Petitioner] to re-file her appeal expires on August 4, 1988," infra, p. 38 . The Board stated in footnote 2 that Petitioner "did not re-file her appeal within the time afforded by that initial decision...." infra, p. 47 .

By this statement and the affirmation, the Board had shown that it holds tight and fast its regulations -- sometimes. Board procedural Rule 5 CFR §1201.113(a), provides that an initial decision does not become final if the petitioner files a petition for review with the Board within thirty-five days of the initial decision. The record shows that Petitioner filed a "Petitioner for Review" in the appropriate time. Therefore, the initial decision could not become final until the Board rendered its judgment, which was August 22, 1988. 5 CFR §1201.113(b). Therefore, if the decision could not become final until August 22, 1988, then the Board could not require Petitioner to act on the ruling by August 4, 1988. The effect of this ruling would require immediate action on an initial decision, with the final order being made sometimes a year later. The regulations make sure this atrocity does not occur, and

the Board should be required to obey the law the same way it expects Petitioner to do.

The Board has always (until now) decided in accordance with 5 CFR §1201.113(a) and (b). The list of cases is long, but one reflects the Board's rulings clearly. In Beer v. Department of the Army, 2 MSPB 226 (1980), the Board held that an "initial decision is not of such force and effect that a party can be required to comply with an order contained therein until the decision itself becomes final." Id. at 226. The Federal Circuit has followed the same line of reasoning. However, for some reason, the Board did not rule the same in this case, which is an abuse of discretion.

Finally, Petitioner's Due Process rights were violated because the Board required her to disobey the regulations to maintain her right to a hearing.

CONCLUSION

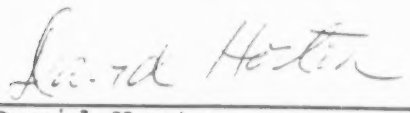
Petitioner's case presents a major public policy issue affecting all federal employees and practice before the Board. For these various reasons, this petition for certiorari should be granted. Petitioner has been denied a hearing on the merits of her case by the refusal of the Merit Systems Protection Board to follow its own rulings, those of this and other courts, and the laws of the constitution, as well as applicable statutes and regulations. "The MSPB cannot, despite its considerable discretion, treat similar situations dissimilarly and be said to be at its most arbitrary when it does so, and thus is under an obligation to follow, distinguish, or overrule its own precedent." Steges v. Defense Investigation Services, Department of Defense, 717 F.2d 1402, 1404 (D.C. Cir. 1983).

Petitioner requests that she be able to present her case on its merits. The Court

may accomplish this either through granting the writ and hearing full argument, or enact a summary reversal of the Board's decision. Petitioner is basing this writ on the Court's decision in Lindahl v. Office of Personnel Management, 470 US 768 (1985), remanded, 776 F.2d 276 (Fed. Cir. 1985):

> [The United States Supreme Court reviews a case] to determine whether there is a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error going to the heart of the administrative decision. Id. at 791.

Respectfully sumitted,



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February 11, 1991

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

LAURA O. SLEDGE, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER DA07528810254 DATE: May 25, 1988

David Horton, Esquire, Texas Rural Legal Aid, Inc., Weslaco, Texas, for the appellant.

Robert J. Egan, Esquire, Dallas, Texas, for the agency.

BEFORE

Sharon Fonsworth Jackson
Administrative Judge

INITIAL DECISION

Laura O. Sledge filed an appeal on March 1, 1988, from an action taken by the Department of Justice, Immigration and Naturalization Service, which removed her from her position of Detention Enforcement Officer. On May 12, 1988, the Board received evidence that appellant has suffered complications on her pregnancy

which require her complete bedrest until the delivery of her child. Appeal File, Tab 16. By Order dated May 13, 1988, the parties were ordered to show cause why the appeal should not be dismissed without prejudice until a time certain following appellant's delivery. Appeal File, Tab 17. They also were advised that, absent timely filed objections, the appeal would be dismissed. No objections were filed. Accordingly, I find that, because of the present status of appellant's health, good cause exists for the dismissal of this appeal without prejudice.

DECISION

The appeal is DISMISSED WITHOUT PREJUDICE to appellant's right to refile the appeal no later than thirty days after the date of the delivery of her child.

FOR THE BOARD: /s/
Sharon Fonsworth Jackson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on June 29, 1988, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by reference to applicable laws,

regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than thirty calendar

days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document was sent by regular mail this day to each of the following:

Appellant

Ms. Laura O. Sledge
1703 Arthur
Brownsville, TX 78520

Appellant's Representative

David Horton, Esq.
Texas Rural Legal Aid, Inc.
259 South Texas Blvd.
Weslaco, TX 78596

Agency Representative

Robert J. Egan, Esq.
Southern Regional Counsel's Office
Immigration and Naturalization Service
311 North Stemmons Freeway
Dallas, TX 75207

Other

Mr. Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 E St., N.W., Room 7635
Washington, D.C. 20415

May 25, 1988

/s/
Rosa Rather
Legal Clerk

The August 22, 1988 decision by the Merit Systems Protection Board is contained in the record. It merely affirmed the Initial Decision of May 25, 1988.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

LAURA O. SLEDGE, Appellant,	)	DOCKET NUMBER DA07528810254
v.	)	
DEPARTMENT OF JUSTICE, Agency.	)	DATE: June 27, 1989

David Horton, Esquire, Texas Rural Legal Aid, Inc., Weslaco, Texas, for the appellant.

M. Elizabeth Younkin, Esquire, Dallas, Texas, for the agency.

BEFORE

Sharon Fonsworth Jackson
Administrative Judge

INITIAL DECISION

Laura O. Sledge filed an appeal on May 6, 1989, from an action taken by the Department of Justice which removed her from her position effective February 12, 1988.

Based on the following analysis and findings, the appeal is DISMISSED.

BACKGROUND

The appellant originally appealed the

removal action to the Board on March 1, 1988. Because of complications in the appellant's pregnancy which necessitated her having complete bed rest, the appeal was dismissed without prejudice to the appellant's right to refile the appeal no later than 30 days after the delivery of her child. See Sledge v. Department of Justice, MSPB Docket No. DA07528810254 (Initial Decision, May 25, 1988). The Board denied the appellant's petition for review of the initial decision and the decision became a final decision of the Board on August 22, 1988. Sledge v. Department of Justice, 38 M.S.P.R. 155 (1988).

The appellant then petitioned the Court of Appeals for the Federal Circuit for a review of the Board's decision and also requested that the Board's decision be stayed. On October 11, 1988, the court denied the appellant's request for a stay and, subsequently, on April 7, 1989, the Court affirmed the Board's final decision.

See Sledge v. Department of Justice, 873 F.2d 1451 (Fed. Cir. 1989) (Table). The appellant then filed this appeal on May 6, 1989.

ANALYSIS AND FINDINGS

The appeal is untimely filed.

The Board's regulations provide that an appeal must be filed within 20 days of the effective date of the action being appealed. 5 C.F.R. § 1201.22(b) (1988). Because the time limit is not required by statute, the administrative judge may waive or modify the regulatory time limit for filing an appeal. See 5 C.F.R. § 1201.12 (1988). In this case, in order to accommodate the appellant's medical condition, the administrative judge modified the time limit for filing an appeal to allow the appellant to refile her appeal no later than 30 days after the delivery of her child.

The date of the delivery of the appellant's child is not known; however, she represented in her first appeal that her

anticipated delivery date was June 20, 1988. Assuming that the appellant was delivered of child within 15 days of her anticipated delivery date, or July 5, 1988, the time limit for the appellant to refile her appeal expired on August 4, 1988. The present appeal which was filed on May 6, 1989, therefore is untimely filed.

The appellant has not shown good cause for the waiver of the time limit.

By Acknowledgment Order issued on May 12, 1989, the appellant was advised of the timeliness issue and provided an opportunity to show good cause for a waiver of the time limit.* Appeal File, Tab 2. The appellant was also advised that she bears the burden

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* Among the factors to be considered in determining whether there is good cause for waiver of the time limit are the length of the delay, whether the appellant was notified of the time limit or was otherwise aware of the time limit, circumstances beyond the appellant's control affecting her ability to comply with the time limit, whether the appellant was negligent in failing to meet the time limit, and whether such failure was due to excusable neglect. See Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 184 (1980).

of proof on the issue of timeliness. 5 C.F.R. § 1201.56(a)(2) (1988). The appellant did not respond on the timeliness issue. The agency, however, moved for the dismissal of the appeal. Appeal File, Tab 4.

The record suggests that the appellant may conceivably have believed that the Board's final decision might affect the time limit for refiling the appeal set forth in the initial decision. The Board's decision became final, however, on August 22, 1988, and there is no evidence that the appellant then attempted to refile her appeal with the Board. Because the appellant sought a stay of the Board's final decision, she again may conceivably have believed that the time limit set out in the initial decision on the original appeal would be altered. The Court, however, denied the appellant's request for a stay on October 11, 1988. There is no evidence that the appellant attempted to promptly refile her appeal at

that time. Once there was no possibility of the Board's decision being stayed by the Court, the appellant was obligated, absent some justifiable circumstance, to immediately refile the appeal with the Board. As the agency pointed out in its motion to dismiss, the appellant waited an additional seven months before refiling her appeal.

The only remaining argument that the appellant might make concerning the timeliness of this appeal is that it was filed within 30 days of the issuance of the Court's decision which affirmed the Board's final decision. Such circumstances, however, do not establish good cause for the waiver of the time limit. The Court's denial of the appellant's stay request in October 1988 was explicit. There was no basis for a misunderstanding. Cf. Dearsman v. Department of the Treasury, 16 M.S.P.R. 631, 636 (1983) (conscious election of a forum will not be interpreted as good cause

for waiver of the Board's time limits). Moreover, there is no evidence that the appellant ever sought guidance as to the applicable time limit once the stay request was denied or made any other effort to protect her appeal rights. I, therefore, conclude that the record is devoid of any evidence which would warrant a waiver of the time limit for filing the appeal in this case.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/
Sharon Fonsworth Jackson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on August 1, 1989, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls

when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

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The United States Court of Appeals
for the Federal Circuit
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Washington, D.C. 20439

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NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document was sent by regular mail this day to each of the following:

Appellant

Ms. Laura O. Sledge
c/o David Horton, Esq.

Appellant's Representative

David Horton, Esq.
Texas Rural Legal Aid, Inc.
259 South Texas Blvd.
Weslaco, TX 78596

Agency Representative

M. Elizabeth Younkin, Esq.
Immigration and Naturalization Service
311 North Stemmons Freeway
Dallas, TX 75207

Other

Mr. Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 "E" St., N.W.
Room 7635
Washington, D.C. 20415

June 27, 1989

/s/
Rosa Rather
Legal Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAURA O. SLEDGE, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER DA07528910380 DATE: April 2, 1990

David Horton, Esquire, Texas Rural Legal Aid, Inc., Weslaco, Texas, for the appellant.

M. Elizabeth Younkin, Esquire, Dallas, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant has petitioned for review of the June 27, 1989, initial decision that dismissed her appeal as untimely filed. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201,115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as

MODIFIED by this Opinion and Order, and still DISMISS the appeal as untimely filed.

BACKGROUND

The agency removed the appellant from her position effective February 12, 1988. She appealed her removal to the Board's Dallas Regional Office on March 1, 1988. Because of medical complications related to the appellant's pregnancy, the administrative judge dismissed the appeal without prejudice to the appellant's right to refile no later than thirty days after the delivery of her child. See Sledge v. Department of Justice, MSPB Docket No. DA07528810254 (Initial Decision, May 25, 1988). The Board denied the appellant's petition for review of the initial decision, and the decision consequently became final on August 22, 1988. See Sledge v. Department of Justice, 38 M.S.P.R. 155 (1988).

The appellant petitioned the U.S. Court of Appeals for the Federal Circuit for a

review of the Board's decision, and also requested that the Board's decision be stayed. On October 12, 1988, the court denied the appellant's request for a stay[1] and, on April 7, 1989, affirmed the Board's final decision. See Sledge v. Department of Justice, 873 F.2d 1451 (Fed. Cir. 1989) (Table); Appeal File, Tabs 1 and 4.

The appellant filed a petition for appeal on May 6, 1989, asking that her prior appeal be reinstated and that the Board give "judicial notice" to the record in that prior appeal. In a May 12, 1989, order, the administrative judge acknowledged receipt of the appeal, and provided the appellant with

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[1] In its decision denying the appellant's request for a stay, the court noted that the appellant's application for relief was "[un]intelligible," and stated that : "[O]ne wonders why Sledge appealed a dismissal without prejudice complaining that it should have been a stay when the case could have been refiled and proceeding by the time the full Board issued its decision." See Appeal File, Tab 3, Sledge v. Department of Justice, No. 88-3470, slip op. at 2 and 3 n.2 (Fed. Cir., Oct. 12, 1988).

the opportunity to submit evidence and argument showing that her appeal was timely filed or that good cause existed for her delay in filing. The agency moved to dismiss the appeal based on untimeliness.

In a June 26, 1989, order, the administrative judge responded to the appellant's request for reinstatement of her appeal by explaining that there is no Board rule, regulation, or precedent that would authorize her to "reinstate" an appeal on which the Board had issued a final decision. The administrative judge subsequently dismissed the appeal as untimely filed, noting that appellant had never responded to her show-cause order on timeliness or to the agency's motion for dismissal based on untimeliness.

The administrative judge found that "the record [was] devoid of any evidence which would warrant a waiver of the time limit for filing an appeal." See Initial Decision at 4. In making that

determination, the administrative judge noted that: (1) The appellant's anticipated delivery date was June 20, 1988 (the actual delivery date is not a fact of record); and (2) assuming that the appellant delivered her child within fifteen days of June 20, 1988 (i.e., July 15, 1988), the time limit to refile her appeal pursuant to the Board's May 25, 1988, decision expired on August 4, 1988. The administrative judge also found no evidence that the appellant had attempted to refile her appeal with the Board after its decision became final on August 22, 1988. In this regard, the administrative judge noted that, even if the appellant (erroneously) believed that the finality of the Board's May 25 and August 22, 1988, decisions were affected by her subsequent appeal to the Federal Circuit, the fact remained that the court denied her request for a stay on October 12, 1988, and she did not attempt to refile her appeal at that time, but instead waited an additional seven

months to refile. Finally, the administrative judge found that the appellant's action of filing her appeal within thirty days of the court's April 7, 1989, decision affirming the Board's August 22, 1988, final decision did not establish good cause for her delay.

ANALYSIS

The appellant has filed both a petition for review of the initial decision and a "motion for re-consideration of Board's initial decision . . . and motion regarding judicial notice and notice of motions." Both submissions include the identical argument -- i.e., that it is incorrect to consider the appeal as untimely refiled because the initial decision never became a final order of the Board.[2] Both submissions

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[2] The appellant contends that her action of appealing to the Federal Circuit prevented the Board's decision from becoming "final," and argues that she therefore was not obligated to comply with the administrative judge's May 25, 1988, directive to refile her appeal within thirty days after the delivery of her child.

also include identical attachments, including copies of the Board's May 25, 1988, decision, the brief submitted by the appellant to the Federal Circuit, and copies of various other pleadings (such as the appellant's petition for review of the May 25, 1988, initial decision) related to the appellant's original Board appeal.

None of these documents have any direct bearing, however, on the good-cause issue that is central to this appeal. In any event, the Board will not now consider these arguments and materials, as they are

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Section 1201.113(b) of Title 5 of the Code of Federal Regulations provides, however, that an initial decision will become final when the Board issues its last decision denying a petition for review. Here, the Board denied the appellant's petition for review on August 22, 1988, and the initial decision consequently became final on that date. Since the appellant did not refile her appeal within the time afforded her by that initial decision and failed to respond to the administrative judge's order to show good cause for her untimely filing, however, we find it necessary to reach the issue of whether the appellant's pursuit of this matter before the Federal Circuit establishes good cause for her additional delay.

included for the first time in the appellant's petition for review, and she has not explained why she failed to raise these arguments or submit these materials below. See Banks v. Department of the Air Force, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence); Avansino v. United States Postal Service, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

It is within the administrative judge's discretion to determine whether the appellant has shown good cause for her untimely filing. See Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 184

(1980). The appellant here failed to respond to the administrative judge's acknowledgement order affording her the opportunity to justify her late filing, or to the agency's motion to dismiss based on untimeliness, and she has failed to explain in her petition for review why she did not respond below. As a result, we find that the administrative judge properly dismissed the appeal as untimely filed. See, e.g., Goode v. Department of Health and Human Services, 5 M.S.P.R. 191, 192 (1981) (administrative judge properly dismissed appeal as untimely where the appellant submitted no reason for her late filing).

ORDER

This is the Board's final order in this appeal. 5 C.F.R. §1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has

jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today:

By certified mail to:

David Horton, Esq.
Main Street - P. O. Box 1341
Fort Davis, TX 79734

By regular mail to:

Laura O. Sledge
c/o David Horton, Esq.
Main Street - P. O. Box 1341
Fort Davis, TX 79734

M. Elizabeth Younkin, Esq.
Office of the Regional Counsel
Immigration and Naturalization Service
311 North Stemmons Freeway
Dallas, TX 75207

Timothy M. Dirks
Office of Personnel Management
Employee Relations Division
1900 E St., N.W., Room 7635
Washington, D.C. 20415

Merit Systems Protection Board
Dallas Regional Office
1100 Commerce Street, Room 6F20
Dallas, TX 75242

By hand to:

Office of the Special Counsel
1120 Vermont Avenue, N.W.
Washington, DC 20419

April 2, 1990

/s/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: Nov. 14, 1990

The judgment of the court in your case was entered today pursuant to Rule 36. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs may be recoverable under Rule 39. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

SLEDGE V JUSTICE, 90-3347
(MSPB - DA07528910380)

Note: This judgment is not accompanied by an opinion prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is public record. It is not citable as precedent. The decision will appeal in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-3347

LAURA O. SLEDGE,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

JUDGMENT

APPEAL from the MERIT SYSTEMS PROTECTION BOARD

CASE NO(S). DA07528910380

This CAUSE having been considered it is

ORDERED AND ADJUDGED:

Per Curiam (MARKEY, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and ARCHER, Circuit Judge.)

AFFIRMED. See Fed. Cir. R. 36.
ENTERED BY ORDER OF THE COURT

DATED Nov. 14, 1990

/s/
Francis X. Gindhart,
Clerk

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LAURA O. SLEDGE,
Petitioner
v.
DEPARTMENT OF JUSTICE,
Respondent

CERTIFICATE OF SERVICE

I, David Horton, a member of the Bar* of this Court, hereby certify that on the 3 day of APRIL, 1991, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Mr. Stephen J. McHale, Esquire, Department of Justice, 550 11th Street, NW, Room #9036, Washington, DC 20530, and to the Solicitor General, Department of Justice, Room 5614, Washington, DC 20530.

David Horton

David Horton
Law Offices of David Horton, PC
730 Nolana
P. O. Box 3096
McAllen, Texas 78502
(512) 682-9483
Counsel for Petition
Counsel of Record

* An application for acceptance is presently before the Court.